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No. 854

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1962

GEORGE FUQUA ..... Appellant

vs.

THE STATE OF MISSISSIPPI ..... Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR REHEARING

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In compliance with Rule 58, the Appellant files this his Petition for a rehearing.

This Petition is based on substantial grounds available to Petitioner although not previously presented to this Court.

THE EVIDENCE OFFERED BY THE STATE DOES NOT RISE TO THE STANDARDS REQUIRED SO AS TO WARRANT A CONVICTION FOR VIOLATION OF THE SUBSTANTIVE LAWS.

At the conclusion of the State's case in chief, the defendant seasonably requested a peremptory instruction to find the defendant not guilty, which was, by the Court, overruled. This error was preserved and urged on the motion for a new trial and Appellant's brief filed in the Supreme Court of the State of Mississippi.

Under the provisions of Section 2044, Mississippi Code of 1942, entitled "Burglary — possession of burglar's

tools," the bare possession of such tools constitutes a violation regardless of the intent with which such tools are possessed. However, the tools, implements or instruments, must be peculiarly adapted to the commission of burglary, larceny or robbery in order to render the possession unlawful.

It is sufficient to charge this crime substantially in the language of the statute, but the proof must conform to the requirements of the statute in that the tools are "designed" for the purposes named in the statute by burglars and not merely that they may be used, their general use and purpose being lawful. *Satterfield v. State*, 174 Ark. 733, 296 S. W. 63.

The term "designed" as used in the statute defining the crime of possessing burglar's tools means more than mere common household articles or everyday work tools capable of use in breaking and entering. The tools must be "designed," that is, contrived or taken to be employed for such purpose. *People v. Dorrington*, 221 Mich. 571, 181 N. W. 831; *State v. Salernitano*, 27 N. J. Supp. 537, 9 A. 2d 820.

> "The burden rests on the state to prove the essential elements of the offense of possessing burglar's tools or implements, as that instruments found in defendant's possession were of the character denounced by the statute." 12 C. J. S. 755, Sec. 70.

Section 2044, Mississippi Code of 1942, does not contemplate possession of common every day work tools of mechanics, plumbers, carpenters, farmers or other persons who may require such tools and implements in their business, trade of profession. If so, the statute would be unconstitutional and void. The tools and implements prohibited and denounced by the statute are those which

are "peculiarly adapted" to aid in the commission of burglary, larceny or robbery. This statute is to be strictly construed or otherwise the possession of practically any tool or implement manufactured would come within the prohibition of the statute.

There are three (3) elementary but essention rules involved in this trial which should be remembered when considering this point of our argument. These rules are (1) presumption of innocence; (2) burden to prove guilt beyond all reasonable doubt; and (3) that such tools and implements are "peculiarly adapted and designed" for the purpose of burglary and larceny as alleged in the indictment. The word "robbery" was not included in the indictment, but only burglary and larceny.

The State offered only one witness in an attempt to establish the requirement that such tools and implements were peculiarly adapted or designed for aid in the commission of burglary or larceny. This witness was Patrolman Jack Anderson, of the Mississippi Highway Patrol. It was this same witness whose hostile attitude and prejudice against the defendant was so evident that the Court cautioned him (R.44), and defense counsel was amazed at the extent thereof (R.289-90).

There was no appreciable effort made by the State to show that any of the tools or items were designed or adapted for burglary or larceny. The record is devoid of any positive evidence in this regard. The substance of the State's case is the introduction thereof. No other witness testified differently in this regard.

Aside from the fact that each and every item introduced in evidence by the State was the ordinary mechanic's tool or household item which may be found in the possession of most garages, mechanics and homes, and

which may be found for sale at practically all hardware, variety and drug stores, with the exception of the 38 caliber pistols which are not recognized by any authorities as tools adapted and designed to aid in the commission of burglary or larceny, but are weapons.

There was no proof that this defendant had been involved in a burglary or larceny or in any other crime.

Under the statute it is the tool or implement itself that determines the legality, or illegality, thereof, and not he who possess it. The determination is as to the res, and not the individual.

The evidence introduced in this cause fell far short of the proof required in cases of this nature. In prosecutions for possession of burglar's tools PROOF MUST conform to requirements of statute in that tools are designed and adapted for unlawful purpose and not merely that they may be used where their general use and purpose may be lawful. *Satterfield v State*, 174 Ark. 733, 296 S. W. 63. The possession of tools in absence of any evidence warranting an inference that Petitioner possessed them for the purpose of committing burglary or larceny was insufficient to sustain a conviction of felonius possession of burglar's tools under statute since the tools in this case, as testimony shows, served a legitimate purpose and afforded no basis for an inference of possession for a criminal one. People v Barrington, 221 Mich 571, 181 N. W. 831.

CONCLUSION

Wherefore, it is respectfully submitted that your Petitioner has been deprived of his constitutional rights as guaranteed by the XIVth Amendment to the Constitution of the United States and that this Court should take

CERTIFICATE

I, E. H. Cunningham, Jr., of counsel for the Appellant, certify that I have this day personally delivered a true and correct copy of the above and foregoing Petition for rehearing to Honorable Joe T. Patterson, Attorney General of the State of Mississippi, at his office in the State Capitol Building at Jackson, Mississippi, and further certify that this Petition is presented in good faith and not for delay, and that this Petition is restricted to substantial grounds available to Petitioner although not presented previously.

Witness my signature this the ___ day of May, 1963.

E. H. Cunningham, Jr.
Of Counsel for Appellant